BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

CHARLESTON TOWN CENTER
COMPANY, LP,

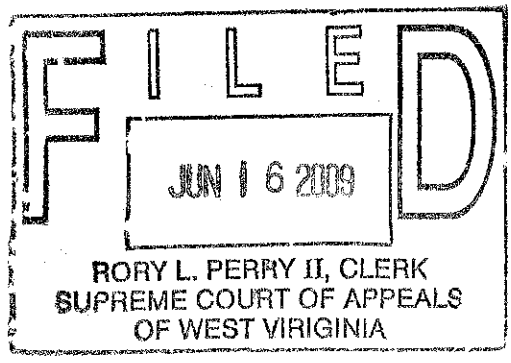
Appellant,

v.

Nos. 34739 & 34740

STEVEN and CYNTHIA BUMPUS, on behalf of STEVEN M. BUMPUS, a minor; AUGUSTA ROBINSON, on behalf of KEVIN STREETS, a minor; and the WEST VIRGINIA HUMAN RIGHTS COMMISSION,

Appellees.



APPELLANT'S REPLY BRIEF

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INTRODUCTION

At the outset, the Appellant states that it recognizes the important anti-discrimination policy that the West Virginia Human Rights Act promotes in West Virginia. Indeed, the Appellant appreciates the fact that numerous organizations, including the American Civil Liberties Union, the National Association for the Advancement of Colored People, and the West Virginia Employment Lawyers Association have sought to files briefs as amici curiae to speak on this important issue. Certainly, the alleviation of all forms of discrimination is a noble and important goal.

However, this matter is not about racial profiling or any other form of race discrimination.

Rather, it is, quite simply, about the ability of a business to be able to enforce its code of conduct,[1] based upon observations made in the course of responding to potential violations of that code, in an effort to protect the safety of its patrons and ensure the enjoyment of its facilities. And, in a tangential sense, this matter is also about the importance that private security professionals and public police officers be able to perform their duties without fear of being second-guessed – in hindsight – by an administrative agency that lacked the first-hand perspective of those security guards and officers in the field.

Unfortunately, it appears that the Appellees view the matter before the Court more as a potential vehicle for overturning well-established law in West Virginia that seeks to protect all citizens than what it truly is – a simple appeal of a West Virginia Human Rights Commission decision.

1 The Appellant's code of conduct is referenced multiple times within this Reply Brief. The entire code of conduct was admitted to the Record as Exhibit 9.

STATEMENT OF FACTS

The facts set forth by Appellees in their Appellees' Brief differ substantially in several areas from the fundamental facts set forth in the Appellant's Brief. Therefore, to the extent that any discrepancies exist between the facts contained in the Appellant's Brief and the Appellees' Brief, the Appellant reasserts its belief in the accuracy of the facts set forth in the Appellant's Brief.

TABLE OF AUTHORITIES

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DISCUSSION OF LAW

As discussed in the Introduction, above, the Appellees appear to view this matter as a means to an end, rather than merely an appeal of the underlying administrative decision based upon the specific grounds articulated in the Appellant's Brief. To accomplish that goal, the Appellees have proffered arguments relying almost solely on their race,[2] while accusing the Appellant of avoiding the discussion of race, altogether.

Indeed, in their Appellees' Brief, the Appellees have suggested that the Appellant crafted the Discussion of Law set forth in its Appellant's Brief in an attempt to conceal an underlying racial animus. Specifically, the Appellees argue,

> This approach attempts to avoid the question of racial motive. These arguments seek to defeat the Commission's case without ever getting to the issue of racial bias, by disputing that the Complainants had standing to bring these complaints (failure to avail) and by disputing that the Complainants had suffered some cognizable adverse action (no denial). If either of these arguments were to succeed, then the complaints would have to be dismissed even though the Complainants were mistreated because of their race. Indeed, the case would necessarily fail even if the CTCM had been explicit in its discriminatory motive, or had even confessed to it.

(Appellees' Br. 16.)

However, the Appellees' arguments merely complicate the rather simple appealable issues articulated in the Appellant's Brief. The most basic one being whether the Appellees met their burden of establishing a prima facie case of discrimination under the West Virginia Human Rights Act. As an additional consideration, throughout this matter, the Appellant has maintained that the

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2 The Appellant recognizes that the Appellees must naturally argue to the Court that the Appellant engaged in race discrimination, as this was the nature of their claims in the underlying administrative action. However, the Appellees' Brief contains very little analysis of the question of a private entity's right to enforce its code of conduct, which is a central issue. Rather, in their brief, the Appellees have essentially taken the position that it is absurd for the Appellant to argue that the Appellees did not meet their prima facie case. Indeed, the Appellees appear to suggest in several areas of their brief, including the portion quoted in this section, that it is a foregone conclusion that the Appellant was motivated by the Appellees' race, rather than the safety and enjoyment of all of its patrons on the evening in question.

central issue is not related to race, but rather the ability of a private business to enforce its code of conduct in a racially neutral manner, based upon the observations of its employees who respond to potential violations.

For the sake of clarity, and in an effort to resist being drawn into arguments that are outside the applicable issues, to the extent possible, the Appellant has attempted to limit its discussion in this Reply Brief to the specific areas that the Court must consider in this appeal, as set forth in the Appellant's Petition for Appeal and Appellant's Brief. However, the Appellant does feel compelled to address a number of issues outside of those necessary for the Court's consideration of this appeal.

I. CHARLESTON TOWN CENTER WAS ENTITLED TO A JUDGMENT IN ITS FAVOR OR A REVERSAL OF THE FINAL DECISION BECAUSE THE APPELLEES FAILED TO ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION.

Despite the assertions set forth in the Appellees' Brief, it remains clear that Administrative Law Judge ("ALJ") Wilson ("Judge Wilson") committed reversible error and that Appellees failed to establish a prima facie case of discrimination. Under the West Virginia Human Rights Act (the "WVHRA"), to establish a prima facie case of discrimination in a place of public accommodation, a complainant must prove the following: (1) that he or she is a member of a protected class; (2) that the complainant attempted to avail himself or herself of the "accommodations, advantages, privileges or services" of a place of public accommodation; and (3) that the "accommodations, advantages, privileges or services" were withheld, denied, or refused to the complainant. Syllabus Point 1, *K-Mart Corp. v. W. Va. Human Rights Comm'n*, 383 S.E.2d 277 (W. Va. 1989). All three elements are required to establish a prima facie case of discrimination. In this matter, the Appellees failed to meet the second and third requirements.

A. The Appellees Cannot Establish a Prima Facie Case of Discrimination Because They Did Not Attempt to Avail Themselves of Public Accommodations.

As to the second requirement of the discrimination test set forth in *K-Mart*, the Appellees did not attempt to avail themselves of the accommodations provided by the Charleston Town Center because they did not enter the mall area with the intent to make purchases from the retail businesses inside. Although the Appellees attempted to avail themselves of the mall's facilities for purposes of social interaction, that is not the underlying purpose of the mall. Indeed, the mall is not in the business of providing a place for non-commercial social interaction. Rather, the Charleston Town Center offers accommodations to consumers to facilitate purchases of items from diverse retail business in a single commercial setting. As the Appellant set forth in its Appellant's Brief, although it recognizes that social interaction is an important societal objective, it is one that is promoted not by private business entities, but rather by public facilities such as parks and similar venues. During the public hearing, the Complainants admitted that they did not intend to make any retail purchases and were not shopping while at the Charleston Town Center facilities on the date at issue. (Record Vol. I. at 76-77, 112, 129.)

However, rather than address this issue squarely, the Appellees attempt to make race the sole consideration, arguing that "[i]n the Charleston Town Center Mall's imagination, its obligation to refrain from discrimination extends only to those who make purchases from its tenants. The CTCM would have this Court rule that the Human Rights Act extends no protection to persons who enter the Mall for purposes other than shopping." (Appellees' Br. 17.) This, again, attempts to bring race into a completely racially neutral issue, i.e., whether or not an individual – of any race – can be said to have attempted to avail himself or herself of a mall's "accommodations, advantages, privileges or services," when he or she had no intention of shopping at the mall. Indeed, even the Appellees have

recognized that the underlying purpose of the mall is commercial in nature. (*Id.* ("[T]he record reflects that the 'business' of the CTCM is to create a context for marketing and to bring the public in; albeit so that its client stores can make sales.")

However, the Appellees have failed to offer any authority for the proposition that entering a mall – or any other type of business – with no intent to purchase goods or services, but solely for purposes of social interaction can be characterized as attempting to avail oneself of a place of public accommodation. Likewise, the Appellees have failed to identify any authority for the proposition that the WVHRA protects an individual's right to enter a business and engage in social interaction that violates that business's established and posted code of conduct. Without any recognized authority for these propositions – and, indeed, throughout their brief – the Appellees have cited as conclusive authority the very findings of fact and conclusions of law contained in the ALJ's Final Decision that is the subject of this appeal.[3]

It is also worth noting that, in their brief, the Appellees discuss at length the fact that, from time to time, the Charleston Town Center presents special events at its downtown Charleston facility, which the Appellees characterize as an attempt to draw potential shoppers to the mall. (*Id.* at 18.) However, the Appellees were not attempting to attend any such event. Moreover, in their brief, the Appellees further argue that

> [t]he irony of Appellant's argument is compounded by the explicit evidence that the Complainants engaged in window shopping while in the Mall [], which is surely one

3 As an example regarding this very issue, the Appellees argue,

> As the ALJ notes, the "Charleston Town Center Mall is engaged in the business of owning and operating a commons area for the use of the public to facilitate shopping and other activities[.]" (Final Decision 27.) Charleston Town Center Mall's business is not primarily retail sales but, rather, the operation of public space where retail sales can occur. As the ALJ noted, "The public is implicitly invited to this commons area as the public's presence facilitates the impulse of such attendees to make purchases from the Mall's tenants[.]"

(Final Decision 27.)

> of the most common and welcomed activities at the CTCM, and that they eventually purchased a meal at Chili's, a tenant of Charleston Town Center Mall.

(*Id.* (internal citation omitted).) Here too, the Appellees ignore the fact that their behavior while in the mall violated the mall's established code of conduct.

Moreover, because the Appellees did not enter Chili's until after they had returned to the mall after visiting a local cinema, their meal at Chili's must be considered a separate event, which was, in fact, a successful attempt to avail themselves of the accommodations at the mall. Indeed, despite the Appellees unsupported suggestion that, had Charleston Town Center known that they were eating in Chili's, they would not have been permitted to do so, they were, in fact, able to enjoy the accommodations of the mall in an uninterrupted manner. (*See id.* at 23 & n.25 ("One has to wonder whether the Complainants would have been permitted to eat unmolested at Chili's, if Lt. Hager had known they were there.").)

Therefore, for the reasons set forth above, the Court should find that the Appellees failed to meet the second requirement of the three-part discrimination test articulated in *K-Mart*.

B. The Appellees Cannot Establish a Prima Facie Case of Discrimination Because No Accommodations Were Denied or Withheld From Them.

As to the third requirement of the *K-Mart* discrimination test, arguing strictly arguendo without waiving the discussion that the Appellees failed to meet the second requirement, the Appellees also cannot establish a prima facie discrimination claim because the Appellant did not deny them such privileges or accommodations. The Appellees cite three instances in which denial of privileges or accommodations allegedly occurred.[4] However, those instances, whether taken independently or collectively, do not establish the prima facie discrimination claim, because in each

4 These three instances include: (1) the interaction at the food court, (2) the interaction at closing time, and (3) the interaction outside Chili's. (Appellees' Br. 22.)

of those instances, the Appellant did not deny the Appellees privileges or accommodations.

In his Final Decision, Judge Wilson stated that the Appellant had denied the Appellees public accommodations because of undue attention paid to them by security officers and because of their removal from mall property by Charleston Police officers. (Final Decision 28-29.) However, as indicated in *K-Mart*, undue attention does not amount to a denial of the privileges of public accommodations. *See K-Mart*, 383 S.E.2d at 281-82. Indeed, under *K-Mart*, even summoning the police in anticipation of a problem does not deny privileges of public accommodations. *Id.* Any undue attention during any or all of the instances that the Appellees cite, could not establish a prima facie case of discrimination.

In responding to the Appellant's Brief on this issue, the Appellees again make race the central issue, without any discussion of their role in the events in the food court or the mall that led to their evictions or their refusal to abide by the orders of the Charleston Police Department, which ultimately led to their arrests. Indeed, the Appellees argue that "[t]he uncontested evidence is that the CTCM repeatedly interfered with the Complainants, evicting them from the food court, the Mall and then the sidewalk. Each of these evictions surely constitutes a 'refusal' and 'denial' sufficient to meet the terms of the statute." (Appellees' Br. 20.)

However, as articulated in the Appellant's Brief, but for the Appellees' violations of the mall's code of conduct, there would have been no need for the mall to take any action to enforce its code. This very premise is supported by the fact that the Appellees enjoyed their meal at Chili's later in the evening without any disruption from the Charleston Town Center. Moreover, it is further supported by Appellee Steven Bumpus's own testimony that he had visited the mall "hundreds of times if not thousands of times," apparently without incident. (*See* Record Vol. I at 67-68.) As

mentioned in the Appellant's Brief, this Court specifically recognized in *K-Mart* that a claim of denial of access to public accommodations is significantly weakened by a complainant's admission that he or she had frequented the business at issue previously without incident. *K-Mart*, 383 S.E. 2d at 282 ("Most influential in our decision . . . is the fact that the [complainants] admitted to peaceably shopping at the St. Albans K-Mart at least once a week for a full year prior to [the incident].")

In their brief, the Appellees go on to attempt to draw a number of distinctions between the facts set forth in *K-Mart* and the instant case, primarily based upon the fact that, in *K-Mart*, the complainants were neither approached nor asked to leave while they were shopping in the store. (Appellees' Br. 21 (citing *K-Mart*, 383 S.E.2d at 282).) The Appellees further argue that "[l]ike the Baram family, Bumpus and Streets were made to feel unwelcome, but the actions of the CTCM[5] directly affected their access as well as their feelings." (*Id.* at 21-22.)

The Appellant agrees that the facts set forth in *K-Mart* indicate that those complainants were not approached and were permitted to shop in the store. However, the distinctions actually cut in favor of the Appellant in this case in at least two regards. First, in *K-Mart*, the complainants entered the store with the clear intention of making purchases and, thereby, availing themselves of K-Mart's commercial offering. *K-Mart*, 383 S.E.2d at 281 ("[T]he Barams entered the store intending to shop for and purchase merchandise.") However, in this case, the record reflects that the Appellees entered the mall with the sole intent of engaging in social interaction and, at a later point in the evening, with the intent to eat at Chili's, which they did without incident.[6]

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5 Despite the Appellees' repeated attribution of the Appellees' eviction to action by the mall, as stated previously, had it not been for the Appellees' violations of the code of conduct, there would have been no need for mall security to approach the Appellees at all.

6 Although the Appellees' may view the events that occurred outside of Chili's as a component of their visit to Chili's, the record reflects that they had, in fact, finished their meal and completed their transaction at the restaurant prior to the time that they were arrested by the Charleston Police Department outside the restaurant.

Second, in *K-Mart*, there was no suggestion that the complainants engaged in any misconduct while they were attempting to avail themselves of K-Mart's accommodations, but merely that they were of Syrian origin and, therefore, met the profile of a group of suspected shoplifters. *K-Mart*, 383 S.E.2d at 278-79. Indeed, in *K-Mart*, there was no underlying reason other than the complainants' appearance for K-Mart management to observe the complainants while they shopped or to summon the police. And yet, even then, this Court found no discrimination. Contrast the *K-Mart* facts with those at issue in this matter, in which the Appellees acted in violation of stated mall policies, and *K-Mart* must be read to support the Appellant's position.

The Appellant also notes that, although the Appellees were asked to leave the food court, they were, in fact, permitted to remain in the mall until around closing time. Indeed, the record in this matter shows that the initial contact in the food court occurred around 7:30 pm, at which time they were asked to leave the food court in accordance with the mall's code of conduct. (Record Vol. III at 28-29; *id.* Vol. I at 77-78.) The record further reflects that the Appellees then remained in the mall until they were asked to leave around closing time, again for an additional violation of the mall's code of conduct. (Record Vol. III at 29-30; *id.* Vol. 1 at 79-83.) Thus, from 7:30 pm until around 9:00 pm, the Appellees enjoyed the Charleston Town Center's facilities without any denial or withholding of access. Moreover, had it not been for the Appellees' violation of the mall's code of conduct, they would not have been asked to leave the facility at all. Whether advised by Lt. Hager of the code of conduct, the code is displayed throughout the mall. Certainly in the hundreds or thousands of previous trips to the mall, the Appellees would have seen the code of conduct prominently displayed.

Finally, the Appellant feels compelled to respond to one of the Appellees' final arguments on

this issue. In their brief, the Appellees' state, "[t]he evidence in the record clearly reflects that white members of the public were still welcomed by the CTCM to use the sidewalks outside the Mall, and were even welcomed to enter the Mall if Lt. Hager believed they were retrieving a car in the garage." (Appellees' Br. 23.) Here again, the Appellees have cited race as the sole basis of their argument, despite the Appellees' own admissions that they refused to leave mall premises when asked by mall security and warned that the Charleston Police Department would be summoned and, indeed, even after the police asked the Appellees to leave the premises. (Record Vol. I at 50-53; 118-122.) Moreover, the Appellees have failed to point to any part of the record that suggests that any "white members of the public" were engaged in any activity similar to that of the Appellees at the time.

Regarding the Appellees' suggestion that white individuals were permitted to reenter the mall while the Appellees were not because of their race, the Appellant admits that it did not permit the Appellees to reenter the mall after closing hours. However, this denial was not because of the Appellees' race, but rather because the Appellees did not have an automobile in any of the mall garages. Indeed, it is the general policy of the Charleston Town Center to only permit individuals to reenter the mall after closing hours for purposes of accessing the mall garages to retrieve their automobiles. For the security of its patrons and businesses, the mall takes steps to limit access to its premises only to individuals using the garage facilities. Because the Appellees had no vehicle in the mall garage, this is an irrelevant issue in this matter, as no individuals, regardless of race, are permitted to reenter the mall after closing hours unless they have vehicles parked in the mall garages.

The Appellees go on to argue under the heading "complete and total withholding of advantages, facilities, or services is not necessary to constitute a violation of the Human Rights Act" that a complete denial of privileges is not necessary for a discrimination claim under the WVHRA.

(Appellees' Br. 23.) However, it appears that the Appellees merely included this section in an effort to raise the ALJ's conclusion in the Final Decision that "there is evidence that other Blacks were targeted from CTCM security and evicted from the Mall with a higher frequency than whites." (*Id.* (citing Final Decision 23-24).) However, again, this appears to be nothing more than an attempt to divert the Court's attention to race rather than the underlying facts of this case that led to the Appellees' eviction and arrest.[7]

i. Undue Attention Does Not Deny Individuals the Privileges of Public Accommodations.

The Appellees next assert that "Appellant claims that under K-Mart, 'undue attention,' 'racial profiling,' and any harassing conduct short of physical exclusion is not enough to create a violation of the Human Rights Act. But the Human Rights Act is broad enough to encompass this form of discrimination." (Appellees' Br. 24.) However, a careful reading of the Appellant's Brief reveals that the Appellant merely raised these points to address Judge Wilson's determination that the Appellant had denied the Complainants public accommodation because of undue attention paid to them by security officers and because of their removal from mall property by Charleston Police officers. (Final Decision 28-29.) Again, this is merely an attempt to divert the attention from the simple race-neutral enforcement of a code of conduct to an alleged underlying racial motivation.

The Appellees go on to argue in their brief that physical exclusion from the premises is not necessary to constitute a violation of the WVHRA. (Appellees' Br. 24-26.) Specifically, the Appellees state that the WVHRA "language covers overt and covert conduct and should be construed to give full meaning to the phrase." (Appellees' Br. 25.) While it is true that the WVHRA should be

7 *See infra* discussion section II, which addresses, *inter alia*, the evidence in the Record that counters the Appellees' argument that "other Blacks were targeted from CTCM security and evicted from the Mall with a higher frequency than whites."

liberally construed to accomplish its objectives,[8] the Court must be conscious of an overbroad interpretation that would lead to unintended results. *See Williamson v. Greene*, 490 S.E.2d 23, 28 (W. Va. 1997). If this Court were to expand the WVHRA to appease the Appellees, it is likely that the statute could be used to find discrimination based upon simple surveillance. By not limiting the scope of the WVHRA language, the Appellees' interpretation would limit the role of security and police in promoting public safety. Here, the Appellees would limit mall security by not allowing it to enforce its racially neutral code of conduct, and prevent the Charleston Police Department from making a lawful arrest after its independent investigation.

The Appellees then, finally, briefly address the underlying reasons that mall security and the Charleston Police Department took action in this matter. (Appellees' Br. 26-27.) Here, the Appellees argue that "the Charleston Town Center Mall [] attempts to address the obvious difference between this case and *K-Mart* by arguing that each time it interfered with the Complainants or ran them out of an area of the Mall, it did so with a legitimate reason." (*Id.* at 26.) Essentially, without acknowledging any violations of the Charleston Town Center's code of conduct, the Appellees argue that the Appellant has somehow conceded that the Appellees did establish their prima facie case.

On this point, the Appellees argue,

> By resorting here to an argument related to motive, Appellant in effect concedes the establishment of the prima facie case, and moves to the next level of the analysis, that is, motive. The holding in K-Mart, which involves the failure of the plaintiff to establish a prima facie case, does not apply here.

(*Id.* at 26-27.)

However, the Appellees totally ignore the fact that the Appellant's discussion section II.B. is an alternative argument, which has no bearing on the Appellant's separate argument in section II.A.

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8 W. Va. Code § 5-11-15.

that the Appellees failed to establish their prima facie case. Both West Virginia and United States law have long acknowledged alternative pleadings and legal arguments as acceptable. *See, e.g., W. Va. Human Rights Comm'n v. Esquire Group, Inc.*, 618 S.E.2d 463, 475 (W. Va. 2005); *Arnold Agency v. W. Va. Lottery Comm'n*, 526 S.E.2d 814, 826 (W. Va. 1999). Indeed, "[a] party is normally permitted to make inconsistent factual allegations in its pleadings." *Arnold Agency*, 526 S.E.2d at 826 (citing 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1283, at 533 (2d ed.1990)). As the Ninth Circuit stated, "Clearly, a policy which permits one claim to be invoked as an admission against an alternative or inconsistent claim would significantly restrict, if not eliminate, the freedom to plead inconsistent claims provided by Rule 8(e)(2)." *Molsbergen v. United States,* 757 F.2d 1016, 1018-19 (9th Cir.), *cert. dismissed,* 473 U.S. 934, 106 S.Ct. 30 (1985). Therefore, an assertion of fact set forth in one claim will not be interpreted as an admission in an alternative or inconsistent claim. *See Arnold Agency*, 526 S.E.2d at 826 (citing *Henry v. Daytop Village, Inc.*, 42 F.3d 89, 95 (2d Cir.1994); *Molsbergen,* 757 F.2d at 1019 ("In light of the liberal pleading policy embodied in Rule 8(e)(2), . . . a pleading should not be construed as an admission against another alternative or inconsistent pleading . . . .")).

ii. The Actions of the Charleston Police Are Not Those of the Town Center and Cannot Provide the Basis for a Finding of Denial of Privileges.

Finally, the Appellees address the issue of the Appellees' arrest outside of Chili's. (Appellees' Br. 28.) At the outset, the Appellees assert that the Appellant "completely misunderstands the ALJ's conclusions regarding the relationship between the arrests and the 'denial and withholding' of advantages and privileges." (*Id.*) However, the Appellees' argument boils down to semantics, essentially stating that Judge Wilson never specifically called the responding police

officers "agents" of the Charleston Town Center. (*Id.*) However although Judge Wilson may have never specifically call the police officers "agents," his ruling clearly indicates that he did consider them to be acting in some form of agency capacity, carrying out the desires of the Charleston Town Center.

Indeed, on page 30 of the Final Decision, Judge Wilson specifically referred to "the utilization of the Charleston Police Department to intimidate [the Appellees] and others of their race upon the direction of the Respondent's agents." (Final Decision 30.) While this finding might not explicitly describe the Charleston Police Department as "agents" of the Charleston Town Center, Judge Wilson's description of the relationship strongly suggests that he did consider the responding police officers to be acting as the mall's agents. Thus, the Appellant respectfully argues that the Appellees' assertion that "[t]he ALJ's Final Decision accepts the proposition that the police officers were not agents of the Mall but, rather, acted in their official capacity" is incorrect. (Appellees' Br. 28.)

Not to belabor this point, but this Court has defined the term "agent" as follows: "An agent is one who, subject to some control of another, acts on behalf of that other as a representative in the conduct of the other's business or contractual relations with third persons." *Jones v. Wolfe*, 509 S.E.2d 894, 897 (W. Va. 1998) (per curiam[9]). Additionally, as discussed at length on pages 14 and 15 of the Appellant's Brief, this Court has determined previously that when a police officer acts within the scope of his official duties – i.e., making an arrest – he acts in his official capacity and not as a private employee. Syllabus Points 4-6, *State v. Phillips*, 520 S.E.2d 670 (W. Va. 1999).

The crux of the Appellees' argument appears to be that the Charleston Town Center – a

9 This court has held that "[a] per curiam opinion may be cited as support for a legal argument." Syllabus Point 4, *Walker v. Doe*, 558 S.E.2d 290 (W. Va. 2001).

private, non-governmental entity – was the underlying causation of the Appellees' alleged discriminatory arrests because it summoned the police for assistance, which ultimately resulted in the arrests. However, this argument completely ignores not only the above-stated legal principles, but also the testimony of Officer Keith Peoples at the public hearing in this matter. Officer Peoples established that, when responding to a summons from mall security, Charleston Police officers exercise their own judgment in determining whether to evict an individual. Officer Peoples specifically testified,

> Q No, I'm sorry, my question wasn't clear. If you, if you're responding to a call from the mall security, okay, and you arrive and they, they ask you to see that somebody is evicted, you evict, you make sure that person leaves, is that correct?
>
> A After we find out exactly what took place. Then if, if security is correct then, yeah, we ask them to go ahead and leave. If not, then we normally give them the name of Dennis Lewis, who's the director of security, and advise them to go talk to him.
>
> * * *
>
> Q Okay. So you don't actually, personally, evict somebody from the mall unless it's pretty clear that there's good cause for it.
>
> A Yes, sir, that's correct.

(Record Vol. II at 62-63.)

Moreover, the Appellees' argument also ignores the fact that, when the Charleston Police Department arrived on the scene and requested that the Appellees leave the area, they refused. (Record Vol. I at 118-123.) Indeed, Kevin Streets's own testimony established this critical fact.

> Q Okay. So you didn't do what they asked.
>
> A Yes.
>
> * * *
>
> Q . . . Did the officers tell you to leave?

A Yeah. They told us to move on like all the way across the street where the transit and that church begins right there. And we just stood there . . . .

(*See id.*) Thus, despite the Appellees' argument that "Lieutenant Hager's act of banishing them is what caused Complainants to be subject to arrest," (Appellees' Br. 30), neither the facts nor the law support that proposition.

Because the Charleston Police officers were not acting at the direction of the Charleston Town Center, the Charleston Town Center cannot be held responsible for their actions. Therefore, to the extent that Judge Wilson's finding that the Appellant denied the Complainants' access to public accommodations is based upon the actions of the Charleston Police officers, it does not conform to the law of West Virginia and should have been set aside by the Human Rights Commission.

In his Final Decision, Judge Wilson also found that the Charleston Town Center denied the Complainants the privileges of public accommodations because officers of the Charleston Police Department ordered the Complainants to leave mall property and subsequently arrested them when they refused. (Final Decision 29.) However, clearly, the Charleston Police officers were acting independently and exercised their own judgment in determining whether to evict the Complainants, as supported by Charleston Police Department Corporal Keith Peoples's testimony on this point. (Record Vol. II. at 62-63.)

The Charleston Police officers were not acting at the direction of the Charleston Town Center, therefore the Charleston Town Center cannot be held responsible for their actions. To the extent that Judge's Wilson's finding that the Appellant denied the Complainants access to public accommodations is based upon the actions of the Charleston Police officers, it does not conform to the law of West Virginia and should have been set aside by the Human Rights Commission.

II. ANY DENIAL OF ACCESS TO PUBLIC ACCOMMODATIONS THAT MIGHT HAVE OCCURRED WAS BASED SOLELY ON A LEGITIMATE NON-DISCRIMINATORY MOTIVE.

The Appellant reiterates its position that the Appellees did not establish that they attempted to avail themselves of public accommodations at the Charleston Town Center or, alternatively, if they did try to avail themselves of such accommodations, that no such accommodations were withheld. Accordingly, as discussed above, motive is not an issue in this matter.

The Appellant recognizes that the record does contain conflicting evidence concerning the enforcement of its code of conduct. Indeed, very rarely is there a case in which the parties do not have conflicting evidence on a particular issue. However, despite the Appellees' contrary belief, the record in this matter does contain sufficient evidence of the mall's attempts to uniformly apply its code of conduct to permit Judge Wilson to find that no discrimination took place. Indeed, a number of examples are set forth in the Appellant's Brief, which the Appellant incorporates herein by reference.

Specifically, the ALJ considered, and Appellees rely upon Officer Brown's testimony, which was admitted over objection. (Final Decision 23; Appellees' Br. 41; Record Vol. II at 69-70.) Given the lack of information regarding Officer Brown's actual call outs or incidents of arrest, this information should not have been considered. However, it should also be noted that Officer Brown also testified that other officers of the Charleston Police Department responded to calls "deal[ing] with juveniles of all race, creed, and color." (Record Vol. II at 76.)

Further, although Appellant still objects to the admission of Exhibit 27, a review of those documents, which represent the individuals banned from the Charleston Town Center, shows that (1) the documents represent 120 individuals who were banned from the CTC for various behaviors from

1997 to 2007; (2) while other identifying factors[10] are recorded, race is rarely noted on the forms; and (3) the race of the individual was noted 20 times (11 times as white and 9 times as black). (*See* Exhibit 27.)

As the Appellees recognized in their brief, "West Virginia Human Rights Commission's findings of fact should be sustained by reviewing courts if they are supported by substantial evidence or are unchallenged by the parties." Syllabus Point 3, *Westmoreland Coal Co. v. W. Va. Human Rights Comm'n*, 382 S.E.2d 562 (W. Va. 1989). However, the *Westmoreland* Court merely articulated this as a general proposition and did not provide any meaningful analysis to guide administrative law judges in its interpretation. Although the Appellees have cited the federal case of *Maturo v. National Graphics, Inc.*, 722 F. Supp. 916 (D. Conn. 1989), this is not binding authority in West Virginia.

Regardless, as stated in the Appellant's Brief and touched on throughout this Reply Brief, the Appellees cannot dispute that they were in violation of the code of conduct. Instead, they have alleged that the code of conduct was enforced against them only due to their race. As this Court has recognized, "[d]iscipline imposed on a minority [] does not alone equate to racial discrimination unless there is a preponderance of evidence that the discipline was imposed in a discriminatory manner or for a discriminatory purpose." *Cobb v. W. Va. Human Rights Comm'n*, 619 S.E.2d 274, 289 (W. Va. 2005). Moreover, the evidence in this matter further establishes that Appellee Steven Bumpus was a regular guest at the Charleston Town Center – visiting the mall "hundreds of times if not thousands of times," apparently without a prior, similar incident. (*See* Record Vol. I at 67-68.) This fact, by itself, illustrates that the Complainants were not targeted because of their race.

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10 Some of the identifying factors include: gender, age, height, build, hair color, tattoos, clothing, and accessories.

In fact, although stated previously in this Reply Brief, it is worth noting again that this Court has recognized that a claim of denial of access to public accommodations is significantly weakened by a complainant's admission that he or she had frequented the business at issue previously without incident. *K-Mart Corp. v. W. Va. Human Rights Comm'n*, 383 S.E.2d 277, 282 (W. Va. 1989) ("Most influential in our decision . . . is the fact that the [complainants] admitted to peaceably shopping at the St. Albans K-Mart at least once a week for a full year prior to [the incident].")

Given these facts, the Appellant respectfully asserts that Judge Wilson's finding that enforcement of the code of conduct was a mere pretext for a discriminatory motive was not supported by substantial evidence in the record and did not conform with applicable state law. Accordingly, the Human Rights Commission should have set aside the Administrative Law Judge's Final Decision.

III. THE FACTUAL FINDINGS IN THE FINAL DECISION, ULTIMATELY UPHELD IN THE FINAL ORDER, IMPERMISSIBLY RESTRICT THE IMPORTANT ROLE OF POLICE OFFICERS AND SECURITY GUARDS TO PROMOTE PUBLIC SAFETY.

In the final section of their brief, the Appellees begin their argument with the assertion that "Charleston Town Center Mall's final argument on appeal is an attempt to obtain special status for Mall security guards, so that their motives and their testimony cannot be doubted and questioned." (Appellees' Br. 37.) This certainly is not what the Appellant seeks through this appeal. Indeed, despite the Appellees' belief that the Appellant feels that security guards are "above the law," the Appellant does recognize that "the Human Rights Act applies to them in the same way it applies to others." (Appellees' Br. 37.) Rather, as articulated repeatedly in this Reply Brief, the Appellant maintains that the central issue is related strictly to the ability of a private business to enforce its code of conduct in a racially neutral manner, based upon the observations of its employees who respond to

potential violations.

The Appellant maintains that the Final Decision, and by extension, the Final Order, consistently discounts those portions of the record that support the Appellant's position. Accordingly, the Appellant incorporates herein by reference the points contained in discussion section III. of the Appellant's Brief. However, the more critical issue of the Appellant's argument is that, as a matter of policy, security guards and police officers should be afforded reasonable latitude in carrying out their duties.

As discussed in the Appellant's Brief, where a public official is both authorized and required to impose appropriate discipline for the maintenance of an appropriate environment, he should not be discouraged in the performance of his official duty. *Cobb v. W. Va. Human Rights Comm'n*, 619 S.E. 2d 274, 289 (W. Va. 2005). In *Cobb*, this Court set aside a Human Rights Commission decision that found that a teacher had denied a student access to public accommodation by disciplining the student. *Id.* at 284. The Court noted that simply disciplining a minority student for violation of a code of conduct did not amount to discriminatory action. *Id.* at 278. In fact, the *Cobb* Court noted that where a public official such as a teacher is authorized or required to impose discipline to maintain a safe environment, that official must be permitted to exercise her discretion to perform that duty. *Id.* at 289.

As argued in the Appellant's Brief, the situation at issue in this matter presents an even stronger case for allowing public officials to perform their duties without impermissibly limiting their discretion by discounting their observance of developing events. Police officers are required to "preserve the public peace and protect the public in general." Syllabus Point 5, *State v. Phillips*, 520 S.E.2d 670 (W. Va. 1999); W. Va. Code § 8-14-3. In order to perform this duty, police officers must

be permitted a reasonable degree of discretion to neutralize threats to the public peace, based upon their observations. By wholly discounting the testimony of such officers, the Human Rights Commission has impermissibly restricted such officers' ability to perform their required duties to protect the public. Although mall security officers – at least insofar as they are not also police officers – do not possess the same statutorily mandated duty to protect the public peace, their enforcement of the Charleston Town Center' code of conduct serves the same function: to ensure enjoyment of public accommodations by all members of the public in a safe, secure environment.

Again, the Charleston Town Center recognizes the importance of both the West Virginia Human Rights Act and the Human Rights Commission. It goes without saying that individuals should not be singled out on the basis of their skin color, gender, age, or any other improper consideration. However, as this Court recognized in *Cobb*,

> [T]here must be proof sufficient to meet the standards [] articulated by this Court that unlawful discrimination actually [has] occurred before liability may be imposed. Otherwise, the legitimacy of the HRC will be brought into question, putting at risk the vital and important role served by the HRC. The HRC must ensure that its decisions are made in a fair and even-handed manner, and, unlike here, based on the *actual* evidence introduced on the record before it."

Cobb, 619 S.E.2d at 290.

Under the relevant case law, it is clear that the evidence presented at the public hearing does not support Judge Wilson's findings, so as to inhibit those entrusted with ensuring a safe public environment from performing their duties, absent a substantial showing that they performed such duties in a discriminatory manner. Therefore, the Appellant respectfully argues that Judge Wilson's findings that wholly discount the testimony of security and police officers constitute an unwarranted exercise of discretion and that his Final Decision and, ultimately, the Final Order of the Human Rights Commission, should be reversed.

REPLY TO AMICUS BRIEFS OF ACLUWV AND NAACP

Based upon the Appellant's understanding that all arguments in response to the Appellees' Brief and all briefs of Amici Curiae are to be consolidated and presented in one reply brief,[11] the Appellant respectfully responds to the amicus brief of the American Civil Liberties Union of West Virginia (the "ACLUWV") and the amicus brief of the Lawyers' Committee for Civil Rights Under Law, The Mountain State Bar Association, and The West Virginia State Conference of the NAACP (collectively, the "NAACP"). The Appellant incorporates and reasserts all arguments contained above herein, and addresses additional issues raised through amici below.

The objective of amici is to urge this Court to adopt J. Miller's dissent in *K-Mart* or extend the majority's holding to the broadest possible limits. Because both arguments raise separate and distinct issues, the Appellant will address each in turn.

I. THE MAJORITY OPINION IN *K-MART* PROPERLY ESTABLISHED THE PRIMA FACIE DISCRIMINATION TEST FOR PUBLIC ACCOMMODATIONS.

Amici argue for the overruling of *K-Mart*, which simply adapted the established discrimination test from the employment context. The three steps to establish a prima facie case for discrimination, although slightly adapted, has been in place for more than thirty-five years.[12] Yet, amici urge for the adoption of Justice Miller's dissent in *K-Mart* (*See* ACLUWV Br.; NAACP Br.)

Before *K-Mart*, the West Virginia Supreme Court of Appeals had not had the opportunity to address discrimination allegedly occurring in a place of public accommodation; the majority of case law up to that point had addressed discrimination in employment. *K-Mart*, 383 S.E.2d at 280. By

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11 The Appellant bases its understanding upon telephone conversations that its counsel had on June 1, 2009 and June 9, 2009 with Edie Nash of the office of Clerk the West Virginia Supreme Court of Appeals and Rory Perry, Clerk of the West Virginia Supreme Court, respectively.

12 The 1973 employment discrimination case of *McDonnell Douglas* is the seminal case in establishing the three-part prima facie test. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

1989, when *K-Mart* was decided, the framework for employment discrimination was well-settled. Further, the framework is still used today in varying forms of discrimination claims. Indeed, similar frameworks can be found in the various employment discrimination contexts, disparate treatment, and harassment. *See, e.g.*, *Shepherdstown V.F.D. v. W. Va. Human Rights Comm'n*, 309 S.E.2d 342 (W. Va. 1983); *Skaggs v. Elk Run Coal Co.*, 479 S.E.2d 561 (W. Va. 1996); *Cobb*, 619 S.E.2d 274.

Amici cite *Browning v. Slenderella Systems of Seattle*, 341 P.2d 859 (Wash. 1959) in support of their position that *K-Mart* was wrongly decided. (ACLUWV Br. 8-9.) However, the *K-Mart* Court expressly distinguished the *Browning* case. *K-Mart*, 383 S.E.2d at 282. In *Browning*, the defendant refused to serve the complainant solely based on her race. *Id.* In *K-Mart*, no such refusal of service was found. *Id.* Therefore, the Court found the *Browning* case inapplicable. *Id.* Here, the Appellant argues that *Browning* is also inapplicable, as the Appellees were not refused, denied, or withheld public accommodations.

Amici, much like the Appellees, try to divert the Court's attention to race in an attempt to construct a medium for overturning well-founded law.[13] Despite amici's focus on race, only the first step of the prima facie framework includes race. Accordingly, the Appellant concedes that the Appellees meet the first step of establishing a prima facie case; the Appellees are members of a protected class. The Court in *K-Mart* appropriately noted that racial motives are evaluated in the second (rebuttal of discriminatory inference) and third (rebuttal is pretext) prongs of the discrimination framework. *Id.* at 281. A careful reading of *K-Mart* demonstrates that the Court

13 Specifically, the ACLUWV cites the ALJ's use of Officer Brown's testimony. (ACLUWV Br. 6.) Officer Brown, despite objection, testified that "probably close to about a hundred percent" of the calls he responded to at the mall involved African-Americans. (Record Vol. II at 69.) Yet, Officer Brown's testimony should not have been considered. Without knowing more about Officer Brown's call outs or incidents of arrest, the testimony is speculative, capricious, and unsubstantiated. However, perhaps more importantly, the ACLUWV's Brief and the ALJ's decision failed to note that Officer Brown also testified that Charleston Police officers responded to calls involving "juveniles of all race, creed, and color." (Record Vol. II at 76.)

properly adapted the well-established *McDonnell Douglas* framework. This framework has provided meaningful relief from discrimination in various contexts for many years.

Amici urge this Court to adopt Justice Miller's dissent in *K-Mart*. (ACLUWV Br. at 7; NAACP Br. at 8.) While articulate and well-reasoned, the dissent in *K-Mart* lacks a standard to evaluate discrimination cases. Such an approach would inevitably lead to unpredictable and uneven results. Discarding an established standard is unnecessary and an attempt by amici to alter the system to reach their desired results. The prima facie framework set forth in *K-Mart* is simply an adaptation of well-settled law. Therefore, this Court should uphold the framework provided in *K-Mart* and other discriminatory contexts, and deny amici's request to adopt Justice Miller's dissent.

II. THE LANGUAGE OF THE WEST VIRGINIA HUMAN RIGHTS ACT IS UNAMBIGUOUS AND WAS PROPERLY INTERPRETED BY THE COURT IN *K-MART*.

West Virginia Code § 5-11-9 sets out the elements necessary for a party to make a complaint of discrimination in a place of public accommodation. Specifically, § 5-11-9(6)(A) provides that it shall be unlawful discriminatory practice for a place of public accommodation to:

> Refuse, withhold from or deny to any individual because of his or her race, religion, color, national origin, ancestry, sex, age, blindness or disability, either directly or indirectly, any of the accommodations, advantages, facilities, privileges or services of the place of public accommodations.

Noticeably, the terms "unwarranted surveillance"[14] or "unwelcome"[15] do not appear in the statute. Such broad terms, as well as others provided by amici, could not have been the intent of the Legislature. However, amici urge this Court to incorporate such broad, overreaching terms into the WVHRA.

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14 ACLUWV Br. 13.

This Court has held that "[i]t is not for [courts] arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted." *Williamson v. Greene*, 490 S.E.2d 23, 28 (W. Va. 1997) (citing *Banker v. Banker*, 474 S.E.2d 465, 476-77 (W. Va. 1996); *Bullman v. D & R Lumber Co.*, 464 S.E.2d 771 (W. Va. 1995); *Donley v. Bracken*, 452 S.E.2d 699 (W. Va. 1994)). *See State ex rel. Frazier v. Meadows*, 454 S.E.2d 65, 69 (W. Va. 1994). Moreover, "[a] statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten." Syllabus Point 1, *Consumer Advocate Division v. Public Service Comm'n*, 386 S.E.2d 650 (W. Va. 1989). *See Sowa v. Huffman*, 443 S.E.2d 262, 268 (W. Va. 1994).

Here, the key terms of the statute are "[r]efuse, withhold from or deny." W. Va. Code § 5-11-9(6)(A). Those terms were interpreted by this Court in *K-Mart* as part of the third step of the prima facie case. The Court found that K-Mart did not refuse, withhold, or deny the Barams any services or amenities because the Barams "entered the store and shopped without hindrance, [and] left without attempting to buy any items offered by K-Mart." *K-Mart*, 383 S.E.2d at 282. The Court specifically rejected interpreting the statute to include uncomfortable or unwelcome feelings, stating that the statute still requires a refusing or denial before discrimination can occur. *Id.*

The broad language urged by amici is inappropriate for the Court to interpret into a clearly worded statute. "[H]umiliation, embarrassment, emotional and mental distress and loss of personal dignity" are simply not found in the WVHRA. (NAACP Br. 20.) Therefore, the WVHRA should not be extended beyond the statutory language.

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15 NAACP Br. 25.

REPLY TO AMICUS BRIEF OF WVELA

Based upon the Appellant's understanding that all arguments in response to the Appellees' Brief and all briefs of Amici Curiae are to be consolidated and presented in one reply brief, the Appellant now respectfully responds to the amicus brief of the West Virginia Employment Lawyers Association (the "WVELA"). The Appellant incorporates and reasserts all arguments contained above herein, and addresses additional issues raised through amicus below.

Dutifully, the WVELA amicus hits the central issue in this appeal – the ability of a business to enforce its code of conduct, based upon observations made in the course of responding to potential violations of that code, in an effort to protect the safety of its patrons and ensure the enjoyment of its facilities. While the Appellant contends that the Appellees did not establish a prima facie case for discrimination, amicus focuses on whether the Appellant met its burden of proof in showing a legitimate, non-discriminatory basis for denying access, which is the second prong in the discrimination framework.

Assuming arguendo that the Appellees could establish a prima facie case for discrimination, the Appellant demonstrated a legitimate non-discriminatory reason for its actions that was sufficient to overcome any inference of discriminatory intent. The Appellant, through security, enforced a racially neutral code of conduct. But for the violations of the code of conduct, no interaction between security and the Appellees would have occurred. Indeed, in his Final Decision, Judge Wilson determined that the Charleston Town Center articulated a legitimate non-discriminatory purpose for its actions, namely enforcing the code of conduct. (Final Decision 30.)

Despite this Court's holding that the non-discriminatory reason given in rebuttal does not need to be a "particularly good one," *Conaway v. Eastern Associated Coal Corp.*, 358 S.E.2d 423,

430 (W. Va. 1986), the Appellant stated a strong rebuttal to the Appellees' claims of discrimination. Further, the reason given does not need to be one that a judge or jury would have acted upon. *Id.* The Appellant's rebuttal goes well beyond the threshold provided by the Court. The Appellant supported its legitimate, non-discriminatory reasoning with credible evidence and testimony that violations of the code of conduct initiated the interactions between security and the Appellees. (*See* Record Vol. I at 73, 90, 108; *id.* Vol. III at 29, 32-33.)

The evidence unequivocally demonstrates the Appellees' code of conduct violations. The interaction at the food court was based on two violations: (1) group of more than four youths, and (2) occupying food court tables and chairs without food or drink. (Record Vol. I at 73, 90, 108; *id.* Vol. III at 29.) The interaction at closing was based on the rule of four and loud behavior (Record Vol. III at 29.) The interaction outside of Chili's was based on a complaint of loud and disruptive behavior. (Record Vol. III at 32-33.) In all instances, the interaction between security and the Appellees was initiated by violations of the code of conduct.

Moreover, this Court in *Cobb v. West Virginia Human Rights Comm'n*, held that discipline in response to noise, tardiness, responsive comments to authority, and complaints from others constituted a sufficient rebuttal to the presumption of discrimination. 619 S.E.2d at 288 (W. Va. 2005). Here, enforcement of the mall code of conduct was in response of the Appellees' violations of the rules. The Appellees testified to being in a group of more than four, complaints from mall tenants, and refusing to comply with requests from the Charleston Police Department. (*See* Record Vol. I at 73, 90, 108.)

The mall's code of conduct is in place to promote a safe shopping environment for all patrons. The rules apply to everyone equally, and the Appellees were only engaged by security when

they failed to comply with the rules. Therefore, Appellant's legitimate, non-discriminatory basis for the interactions with the Appellees clearly meets burden necessary to rebut any inference of discrimination.

CONCLUSION

For the foregoing reasons, the Administrative Law Judge's Final Decision and the subsequent Final Order of the Human Rights Commission should be reversed because the Appellees failed to make a prima facie case of discrimination in a place of public accommodation. The Appellees did not attempt to avail themselves of the services and privileges provided by the Charleston Town Center. Furthermore, the applicable case law shows that the actions of the Charleston Town Center did not deny the Appellees any such access or privileges and that the actions of Charleston Police officers cannot be attributed to the Charleston Town Center.

Alternatively, any such denial of access or privileges that may have occurred was the result of a legitimate non-discriminatory purpose – i.e., the uniform enforcement of a racially neutral code of conduct – and the Appellees cannot prove by a preponderance of the evidence that this was not the true reason for the alleged denial of public accommodations. Accordingly, the Charleston Town Center Company respectfully asserts that the West Virginia Human Rights Commission should have set aside the Administrative Law Judge's Final Decision.

PRAYER FOR RELIEF

WHEREFORE, Your Appellant prays that this Honorable Court reverse the Final Order of the West Virginia Human Rights Commission of November 26, 2008 and award judgment to the Appellant as a matter of law, or, in the alternative, remand this matter such that the Appellant be granted a new public hearing on any issues that this Honorable Court deems not to be disposable as a matter of law.

Dated: June 16, 2009

Respectfully submitted,

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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

CHARLESTON TOWN CENTER
COMPANY, LP,

Appellant,

v.

Nos. 34739 & 34740

STEVEN and CYNTHIA BUMPUS, on
behalf of STEVEN M. BUMPUS, a minor;
AUGUSTA ROBINSON, on behalf of
KEVIN STREETS, a minor; and the WEST
VIRGINIA HUMAN RIGHTS COMMISSION,

Appellees.

CERTIFICATE OF SERVICE

I, L. Kevin Levine, counsel for the Petitioner, Charleston Town Center Company, LP, hereby certify that on June 16, 2009, I served a true copy of the attached *Appellant's Reply Brief* upon counsel and parties of record, as indicated below, by mailing true copies thereof via the United States mail, in postage paid envelopes:

Paul R. Sheridan
Deputy Attorney General
Civil Rights Division
P.O. Box 1789
Charleston, WV 25326-1789

Additionally, the original and nine copies of the brief were hand delivered this date to:

The Honorable Rory L. Perry, II, Clerk
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State Capitol, Room E-317
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